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IN THE
Supreme Court of the United States

October Term, 1971

No.

**SALYER LAND COMPANY, a California corporation,
C. EVERETTE SALYER; FRED SALYER; LAWRENCE
ELLISON; and HAROLD SHAWL,**

Appellants,

vs.

**TULARE LAKE BASIN WATER STORAGE DISTRICT, a
public district,**

Appellee.

**On Appeal from the United States District Court for
the Eastern District of California.**

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Eastern District of California (three judges) entered on March 10, 1972, denying an injunction restraining the enforcement, operation and execution of §§41000 and 41001 of the California Water Code, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below.

The opinion of the United States District Court for the Eastern District of California (three judges) is not yet reported. Copies of the memorandum and order convening a three-judge court, of the memorandum and order of that court, and of the concurring and dissenting opinion of Circuit Judge Browning are attached hereto as Appendix A.

Jurisdiction.

This suit was brought under 28 U.S.C. §2281, to restrain the enforcement, operation and execution of a State statute as unconstitutional. The judgment of the United States District Court (three judges) was rendered February 17, 1972, and entered March 10, 1972. Notice of appeal was filed in that court on March 14, 1972. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, U.S. Code, §§ 1253 and 2101(b).

Statutes Involved.

§§ 41000 and 41001 of the California Water Storage District Law (Water Code, §§ 41000 and 41001) are as follows:

“§41000. Qualification. Only the holders of title to land are entitled to vote at a general election.

“§41001. Vote in precinct; number of votes. Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each one hundred dollars (\$100), or fraction thereof, worth of land, exclusive of improvements, minerals, and mineral rights therein, in the precinct.”

The Questions Presented.

1. Does a statute granting each landowner in a water storage district one vote for each one hundred dollars of assessed valuation deny smaller landowners the equal protection of the laws?
2. Does a statute which restricts the franchise in a water storage district to landowners deny farmers and residents not owning land the equal protection of the laws?

Statement of the Case.

Plaintiffs C. Everette and Fred Salyer are two of the eleven directors of defendant Tulare Lake Basin Water Storage District, which comprehends 193,000 acres in Kings and Tulare Counties, California. Plaintiff Salyer Land Company is a large owner and lessee of land in that district. Plaintiff Harold Shawl is a small landowner, and plaintiff Lawrence Ellison is a resident of the district who owns no land. All joined in an action filed in the United States District Court for the Eastern District of California on May 5, 1970, challenging the constitutionality of §§ 41000 and 41001 of the California Water Code limiting the franchise in water storage districts to landowners, and weighting the ballot by granting one vote for each one hundred dollars of assessed valuation. The complaint also alleged that the district was malapportioned.

On November 13, 1970 United States District Judge Crocker filed a memorandum and order stating that the complaint "presents a substantial constitutional question as to whether the sections of the California Water Code are in conflict with the United States Constitution", and convening a three-judge court. That court, which was composed of Circuit Judge Browning

and District Judges Crocker and Schnacke, received the case on an agreed statement of facts, and rendered its decision February 17, 1972. The majority, composed of Judges Crocker and Schnacke, held Water Code sections 41000 and 41001 constitutional, sustaining both the exclusion of non-landowners from the franchise and the weighting of that franchise according to assessed valuation. Circuit Judge Browning concurred in so much of the opinion as excluded non-landowning residents from the ballot, but dissented from the exclusion of farmer lessees and from the weighting of the franchise by assessed valuation. All three judges agreed that the district was malapportioned, the majority finding its failure to redistrict itself for forty years "a classic violation of equal protection", and it was directed "to submit a plan to correct this malapportionment within six months of the date this decision becomes final". Plaintiffs have appealed from that part of the judgment sustaining the validity of §§ 41000 and 41001 of the Water Code.

The Questions Are Substantial.

Tulare Lake Basin Water Storage District is a political subdivision of the State of California¹, closely akin in substance and function to an irrigation district.² The great difference is in government. In irri-

¹Plaintiff's Exhibit 14 is an opinion of the Attorney General of California dated February 20, 1969, the salient portion of which is as follows: "I have concluded that water storage districts are considered political subdivisions of the State". Compare the language of *Avery v. Midland County*, 390 U.S. 474, 479 (1968): "The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State".

²Calif. Water Code §39060 is as follows: "The [water storage] districts formed pursuant to this division are districts of the nature of irrigation, reclamation, or drainage districts in re-

gation districts all registered voters have the franchise.² In water storage districts none may vote but landowners³ and their vote is weighted; there is one vote for each one hundred dollars of assessed valuation.⁴ The result is that almost all the seventy seven residents of the district are disenfranchised. Farmers leasing but not owning land, although vitally interested in and affected by the district's operation, have no voice in its governance. The hierarchy of votes among landowners runs from one vote each for certain very small landowners to 37,825 votes for the J. G. Boswell Company. As of the date of filing this litigation six of the eleven directors of the district were Boswell employees or stockholders. Elections have little point in such a system, and although California law provides for general elections in water storage districts every other year,⁵ this district had had none since 1947.⁶

Under California law a unit such as Tulare Lake Basin Water Storage District is exclusively governmen-

spect to all matters contemplated in the provisions of the constitution of the State of California relating to irrigation, reclamation, or drainage". Defendant district has conceded that water storage districts and irrigation districts "are virtually identical in all respects relevant to this case". Reply memorandum filed September 30, 1970, page 8.

²Calif. Water Code §20527; Elections Code, §§ 20, 21.

³Calif. Water Code §41000.

⁴Calif. Water Code §41001.

⁵Calif. Water Code, §41300.

⁶Plaintiff Salyer Land Company called a special election in 1967, Calif. Water Code §41550. On May 19, 1967 the district's then and present president, longtime Boswell employee, director and stockholder Louis T. Robinson, addressed the California Districts Securities Commission as follows:

"MR. ROBINSON: I know you shouldn't forecast elections and that causes me a little hesitancy to say what I am going to say.

(This footnote is continued on next page)

tal.⁸ Upon formation of a water storage district all water rights of the state within the district are given, set apart and dedicated to it.⁹ Water is the life blood of California; the special importance of water is recognized both by its constitution¹⁰ and statutes.¹¹

Apart from its control of California's most vital natural resource, Tulare Lake Basin Water Storage District acts in a governmental capacity. It had a budget of \$481,000 in 1970 and \$405,000 in 1971. It owns laterals connecting with the California Aqueduct which have been constructed "at a cost of approximately \$2,500,000."¹² It possesses and has exercised the

"The eleven divisions in this large farming operation are completely controlled. You are going to have the same eleven directors on Tuesday that you have got today—with one exception. One of the directors is having some health trouble and he is going to be replaced; but other than that, they are going to be the same eleven directors."

* * *

"MR. ROBINSON: Well, I have no concern about the election.

"But suddenly if a new board of directors were to come in, why then I would have nothing but opinion. But I have no concern about the election. *The eleven divisions are controlled by people with enough votes to put back the same directors they have now—including the two Salyers that are dissenting at this time. They will be returned; the other nine will be returned.*"

(Emphases added throughout this jurisdictional statement.)

"State agencies such as irrigation or reclamation districts * * * are agencies of the state whose functions are considered exclusively governmental; their property is state owned, held only for governmental purposes; they own no land in the proprietary sense." *Glenn-Colusa Irrigation District v. Ohrt*, 31 Cal.App.2d 619, 88 P.2d 763, 765 (1939).

⁸Calif. Water Code, §43158.

¹⁰Article 14, Section 3: "It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable. . . ."

¹¹Calif. Water Code, §§ 100, 102, 104, 105.

¹²Answer of defendant, page 8.

power of eminent domain.¹² It enjoys the tax immunity granted by the State of California to public bodies.¹⁴ It is subject to the provisions of the statute conferring governmental immunities and to the exceptions therefrom imposing liability.¹⁵ It may issue general obligation bonds secured by assessments levied on the lands in the district.¹⁶ The district may provide tolls and charges for the use of water, irrigation, and power,¹⁷ and it may sell surplus water and power.¹⁸

Tulare Lake Basin Water Storage District submitted the opinion of the Attorney General of California that it is a political subdivision of the state as part of an application for federal moneys, pursuant to the Federal Disaster Act, Public Law 875, and received \$234,512.24 from the federal government pursuant to that application. The federal legislation authorizing this expenditure limited the grants to "any project of a State, county, municipal or other local government agency for flood control, navigation, irrigation, reclamation, public power, sewage treatment, water treatment, watershed development, or airport construction. . . ."¹⁹

¹²Calif. Water Code, §43530.

¹⁴Calif. Water Code §43508.

¹⁵Calif. Government Code, §811.2.

¹⁶Calif. Water Code §§ 4550 ff.

¹⁷Calif. Water Code §§ 43006 ff., Calif. Water Code §§ 43025 ff.

¹⁸Calif. Water Code §§ 43507, 43533, 43555, 43001, 43026. An official summary of the powers and functions of water storage districts, taken from Bulletin No. 155, Department of Water Resources, State of California, "General Comparison of California Water District Acts", is attached as Appendix C.

¹⁹42 U.S.C.A. §1855ee.

The defendant district comprises most of the dry bed²⁰ of Tulare Lake in Kings and Tulare Counties, California. Four major operators, the J. G. Boswell Company, plaintiff Salyer Land Company, West Lake Farms and South Lake Farms, farm almost eighty five per cent of the land in the district. The remaining fifteen per cent is farmed by smaller farmers; if the latter be lessees they are accorded no voice whatever in the functions of the district. The *amici curiae*²¹ and the defendant have been at some pains to justify this situation. Counsel for California Central Valleys Flood Control Association claimed below that this problem

“... is easily remedied within the existing procedure by the tenant requesting in his lease a provision for a proxy from the lessor (as allowed in Section 41,002) to cast the lessor's votes in district elections in exchange for the obligation to pay the district assessments on the land leased.”²²

²⁰The great flood of 1969, largest since the legendary flood of 1906, inundated approximately 88,000 of the district's 193,000 acres. Evaporation and irrigation use gradually dissipated the water, and the lake area became completely dry again in August, 1971.

²¹The California Central Valleys Flood Control Association filed a brief *amicus curiae* upon its representation that its constituent districts “all vote on the same basis as the defendant in this action, and accordingly the decision rendered herein will have drastic and far reaching effects upon all reclamation districts in California”. The Irrigation Districts Association of California also filed a brief *amicus curiae*, stating that that Association “is vitally interested in any attack on landowner voting qualifications in view of the fact that a majority of the over 250 public districts which are members of the Association, use landownership voting principles in some form or another under the various State statutes under which they are formed. The members of the Association distribute for irrigation, municipal and domestic use, over 75% of the water in the State of California”.

²²Brief of California Central Valleys Flood Control Association, page 10.

Counsel for the Irrigation Districts Association of California, put it like this:

"Certainly, lessees of owners have a more direct interest and are perhaps more greatly 'affected' by District activities. Many leases, however, are on a one year or year to year basis. In each case their occupancy is contractual so to that extent they may bargain for and receive such assurances as they request as to how the landowner will act in reference to his control over District activities."²³

The defendant district was more candid than either of the *amici*:

"... If the lessee's bargaining position is strong enough, he can perhaps by contract acquire a proxy to cast his landowner's ballots. If his bargaining position is not that strong, he will have to make the best deal he can. . . ."²⁴

Judge Browning was unimpressed with this reasoning.

"Defendant suggests that the lessees might obtain a provision in the lease for a proxy from the lessor as allowed by §41002. If a statute otherwise infringes upon the Equal Protection Clause, the infringement of constitutional rights is not ameliorated by a possibility that relief might be obtained through private contracts."

The majority below did not discuss the problem of the farmer lessees. This voteless group is obviously in-

²³Brief of Irrigation Districts Association of California, page 20.

²⁴Defendant's Reply Brief, pages 9, 10.

terested and affected, by any criterion, and Judge Browning addressed himself to the issue:

"Contrary to the majority's view, however, this is not true of the exclusion of those who lease lands in the district for farming. This group's interest in the district's projects to increase the water available for farming and to improve its distribution is indistinguishable from the interest of the owners. They are also equally interested in the cost of the district's projects, for this expense will be passed on to them by express agreement or in the form of increased rentals. See, e.g., *Phoenix v. Kolodziejski*, *supra*, 399 U.S. 204, 210-11. And obviously the state's interest in intelligent and responsible decisions regarding the district's water management program is not advanced by excluding those who actually farm the land."

The Court below was unanimous in permitting the exclusion of plaintiff Lawrence Ellison from the ballot, despite the fact that Ellison is 62, has been in the area for forty years, has held responsible positions with several of the larger agricultural operators in the district, is interested in water matters, is a registered voter and a resident of the district, and would like to vote. It is said that he does not have a sufficient interest. It is difficult to agree. He lost his job with the J. G. Boswell Company because of the layoffs occasioned by the 1969 flood. The record in this case demonstrates that the flooded area was increased over three feet in depth by the reception of 300,000 acre feet of flood water from the Kern River. This would have been reduced to approximately 100,000 acre feet had Buena Vista Lake been used for flood stor-

age.²⁵ In past years the flood waters of the Kern River have filled Buena Vista Lake in Kern County before going on to Tulare Lake. 1969 is the first year in recorded history in which this was not the case. The record made in the trial court shows that the non-Boswell directors of the defendant district sought to have it take action to ensure that Buena Vista Lake receive the flood waters of the Kern to its full capacity, a position the record demonstrates the defendant district uniformly to have taken in the past. In 1969 the six votes of the J. G. Boswell Company were cast to prevent the defendant district from so acting; the reason for the break with precedent was that in 1969 the J. G. Boswell Company was itself farming the whole of Buena Vista Lake. It was at this time that plaintiff Salyer Land Company, which itself farms some 40,000 acres inside and outside the defendant district, and whose interest might reasonably be supposed to have lain with weighted landowner voting, became convinced that it was a poor system. But those who say that the residents have no interest were not at Tulare Lake in 1969. The water rose to a height of 192.5 U.S.G.S. datum, higher than any residence in the district. Had the major levees broken, the homes would have been flooded. The minutes of the meeting of the board of directors of the defendant district held March 4, 1969, at the height of the flood emergency, are plaintiffs' Exhibit 6 in the record made in the court below. That meeting determined, on a vote of six to four, that the flood waters of the Kern River would come into the district, while Buena Vista Lake remained dry. Anyone who says that persons occupying homes in the

²⁵A record was made on this in the court below, and the fact is not disputed by defendant.

district were not vitally interested in and affected by that decision, with great respect, simply was not there.

Even more indefensible than the exclusion of residents from the franchise, however, is the weighting of the ballot by assessed valuation. The result is to give several of the smaller landowners one vote each. Thomas J. Amos has one vote, as do Ada Hornbeak and Rose Catanz. Plaintiff Harold Shawl shares 23 votes with his partner, springing from the ownership of 65 acres. But the J. G. Boswell Company is entitled to vote 37,825 times. Judge Browning dissented from the majority on the issue of the weighted franchise:

"Defendant has identified no compelling state interest in weighted voting in water storage district elections.

* * *

"Neither can it be said that the state's interest in intelligent and responsible elections is served by weighted voting. There is nothing in the record to support the assumption that a small landowner is less likely than a large one to possess the information and understanding of water development problems that is requisite to intelligent and responsible voting on the affairs of a water storage district. Cf. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). And the landowner's interest in finding and implementing solutions to those problems is no less acute because his operation is small. Efficient production from his smaller acreage may be of greater economic consequence to him; and the lesser absolute share of the cost of district projects he may be required to bear may impose a greater burden. As Judge Wisdom said in a related context, 'In terms of voting re-

sponsibility, there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more to that person than a hundred thousand dollar house to another.' *Stewart v. Parish School Board of Parish of St. Charles*, 310 F. Supp. 1172, 1179 (E.D. La. 1970), *aff'd* 400 U.S. 884 (1970). See also *Burrey v. Embarcadero Municipal Improvement District*, 5 Cal. 3d 671 (1971)."

It is submitted that Judge Browning's view is sustained by the decisions of this Court. In *Gray v. Sanders*,²⁶ this Court asked, "How . . . can one person be given twice or ten times the voting power of another person . . . ?"²⁷ In *Gray* the Court went on to speak of "equality among those that meet the basic qualifications".²⁸ In *Reynolds v. Sims*,²⁹ this Court thought it "inconceivable" that a state law could permit the votes of some citizens to be "multiplied by two, five or 10. . . ."³⁰ In *Harper v. Virginia State Board of Elections*³¹ this Court held that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter . . . an electoral standard. Voter qualifications have no relation to wealth. . . ."³² In *Harper* this Court went on to say that "Wealth, like race, creed, or color, is

²⁶372 U.S. 368 (1963).

²⁷372 U.S. at 379.

²⁸372 U.S. at 380.

²⁹377 U.S. 533 (1964).

³⁰377 U.S. at 562.

³¹383 U.S. 663 (1966).

³²383 U.S. at 666.

not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race [cit. omitted] are traditionally disfavored. [Cita. omitted]. To introduce wealth . . . as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."³³ "For to repeat, wealth . . . has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned".³⁴

In *Kramer v. Union Free School District*,³⁵ this Court struck down a New York statute limiting the franchise in certain school districts to those who owned or leased real estate, or who were the parents of school children. In *Cipriano v. City of Houma*³⁶ and *Phoenix v. Kolodziejski*,³⁷ this Court struck down statutes of Louisiana and Arizona limiting the franchise in revenue and general obligation bond elections; respectively, to property owners.³⁸ In *Hadley v. Junior College District*,³⁹ this Court held that "once a State has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded'".⁴⁰

³³383 U.S. at 668.

³⁴383 U.S. at 670.

³⁵395 U.S. 621 (1969).

³⁶395 U.S. 701 (1969).

³⁷399 U.S. 204 (1970).

³⁸In *Phoenix* Mr. Justice White said, "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. . . ."

³⁹397 U.S. 50 (1970).

⁴⁰397 U.S. at 58, 59.

In *Gordon v. Lance*,⁴¹ Mr. Chief Justice Burger stated as follows:

"While *Cipriano* involved a denial of the vote, a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective. See *Stewart v. Parish School Board*, 310 F. Supp. 1172 (E.D. La.) *aff'd*, 400 U.S. 884 (1970)."⁴²

Stewart, the case cited by the Chief Justice, was a three-judge court decision involving constitutionality of a Louisiana statute limiting the franchise to property owners, and providing also for weighted voting. The decision was affirmed by the Supreme Court,⁴³ and that affirmation has precedential value. Let us examine what was affirmed in *Stewart*:

"By gearing the weight of each elector's vote to the amount of his assessed property the laws debase the vote of small landowners. We hold therefore that the exclusion of all non-property taxpayers and the dilution of the small property holder's vote violate the Equal Protection Clause of the Fourteenth Amendment."⁴⁴

* * *

"*Kramer* and *Cipriano*, with the aid of *Reynolds v. Sims*, *Avery*, and *Harper*, teach that laws restricting the right to vote—we say, in any election—do not carry the usual presumption of constitutionality."⁴⁵

* * *

⁴¹403 U.S. 1 (1971).

⁴²403 U.S. at

⁴³400 U.S. 884 (1970).

⁴⁴310 F.Supp. at 1173.

⁴⁵310 F.Supp. at 1176.

"A significant result of this reading of *Kramer* is that property qualifications *simpliciter* may no longer be acceptable eligibility tests, even in such traditional areas as school millage or sewer assessment elections. It would make no difference that a community's tax structure was such that only property owners directly paid for such proposals. The Court's concept of 'interest' will not permit the exclusion of residents who do not own property, since they share a concern for and stake in the quality of the schools the young attend and the operation of the sewers which make the city habitable."⁴⁶

* * *

"There are obvious differences between the case before the court and *Kramer*, *Cipriano*, and *Turner*. It is significant, however, that in none of the cases did the Supreme Court recognize a constitutional difference between a general election and a special-purpose election."⁴⁷

* * *

"The requirement that the bond issue be approved by a majority of the taxpayers voting representing a 'majority of the assessed property owned by those taxpayers who are actually voting' apparently rests on the assumption, first, that property owners have a special pecuniary interest; second, that the larger the assessment the greater the interest and the greater the need to protect large property owners from irresponsible owners having no property."⁴⁸

* * *

⁴⁶*Ibid.*

⁴⁷310 F.Supp. at 1177.

⁴⁸310 F.Supp. at 1179.

"In terms of voting responsibly, there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more to that person than a hundred thousand dollar house to another.

"The actual effect of gearing assessments to the vote is simply to dilute the participation of small landowners and to exaggerate the participation of large landowners in violation of the one man, one vote canon."⁴⁹

* * *

"There are two constitutional issues in this case: first, the restriction of the franchise to property taxpayers; second, the requirement that the majority of the voters represent a 'majority of the assessed property'. Since the Court agrees with the plaintiffs on the first issue, it might be said that it is unnecessary to reach the second issue. But the two limitations have been inseparable since 1898. Moreover, weighting the vote in favor of the large property owner points up the unsoundness of limiting the vote to property taxpayers."⁵⁰

* * *

"At this point in history, this is an intolerable discrimination."⁵¹

It is not possible to reconcile the reasoning and result in *Stewart* with the reasoning and result of the court below in the case at bar.

⁴⁹*Ibid.*

⁵⁰310 F.Supp. at 1180.

⁵¹*Ibid.*

State court decisions concerning landowner qualifications and weighted voting in special districts are now in considerable confusion. This situation is pointed up by decisions in September and November from the Supreme Courts of California and Wyoming. In *Burrey v. Embarcadero Municipal Improvement District*,⁸³ the California Supreme Court gave short shrift to a statute limiting the franchise to landowners and giving each landowner "one vote for each one dollar (\$1) in assessed valuation of land owned by him. . . ." The Court said that "the equality principle . . . is applicable when the weighted vote is based on property value . . ."⁸⁴ and found the system "inconceivable" and "extraordinary".⁸⁴

"In conclusion, it would be difficult to imagine a more radical variation in voting strength than results from this land value voting scheme. As Wallover, Inc. itself assets, the weighting of votes by land value has continued to guarantee that corporation well over a majority of the votes. Instead of 'one person, one vote' we have here a case of 'one corporation, 285,689 votes.'"⁸⁵

The California Supreme Court in *Burrey* relied heavily on this Court's decisions in *Avery*, *Hadley*, *Reynolds*, *Phoenix*, *Harper*, *Kramer*, and *Cipriano*. But two months later the Supreme Court of Wyoming, decrying "a tendency for judges and courts to overreact to decisions of the United States Supreme Court", held in *Associated Enterprises, Inc. v. Toltec Watershed Im-*

⁸³5 Cal. 3d 671, 97 Cal. Rptr. 203, 488 P.2d 395 (1971).

⁸⁴5 Cal. 3d at 678.

⁸⁵*Ibid.*

⁸⁶5 Cal. 3d at 679. Compare the situation of the J. G. Boswell Company in the case at bar.

*provement District*⁸⁶ that a Wyoming statute limiting the franchise to landowners with provision for a weighting factor for acreage, was not invalid. The Court quoted with approval from a 1902 Missouri case:⁸⁷

"The fact that each owner is entitled to one vote for every acre of land owned by him creates no more infirmity in the law than the right of each stockholder of any corporation to cast as many votes as he owns shares of stock renders such laws invalid. In both instances the majority in interest, instead of the majority in number, controls; and who shall say such laws are not just?"⁸⁸

The Wyoming Court also relied on a 1908 decision from Nebraska, *State ex rel. Harris v. Hanson*.⁸⁹ The essence of the *Harris* decision is as follows:

"... [I]t cannot be said that the formation of the district was illegal because electors of the district owning no real estate were barred from participating therein, or because each property owner was given a vote for each acre or lot of land he owned."⁹⁰

The interesting thing is that the Nebraska court relied on the old California case of *People ex rel. Van Loben Sels v. Reclamation District No. 551*,⁹¹ a decision of

⁸⁶.....Wy., 490 P.2d 1069 (1971).

⁸⁷*Mound City Land & Stock Co. v. Miller*, 170 Mo. 240, 70 S.W. 721 (1902).

⁸⁸490 P.2d at 1072.

⁸⁹80 Neb. 724, 115 N.W. 294, 80 Neb. 738, 117 N.W. 412 (1908).

⁹⁰115 N.W. at 298.

⁹¹117 Cal. 114, 48 Pac. 1016 (1897).

dubious value in the state of its origin. The California Supreme Court in *Burrey* refers to it as one of "a series of old California cases" and says, "We need not comment upon the continuing validity of these cases; they do not govern here".⁶² It is not possible to reconcile the reasoning and result in *Toltec* with the reasoning and result in *Burrey*, just as it is not possible to reconcile the reasoning and result in the case at bar with *Burrey*, *Stewart*, or this Court's decisions in *Harper*, *Hadley*, *Kramer*, *Cipriano*, and *Phoenix*.

The intermediate appellate courts in California have also wrestled with the problem. In *Schindler v. Palo Verde Irrigation District*⁶³ the statute concerned limited the franchise to landowners, and gave them "one vote for each \$100 of assessed value of his property . . ." A small landowner sued to establish the principle of "one landowner—one vote". The California Court of Appeal for the Fourth Appellate District held that the Voting Rights Cases apply to an irrigation district.⁶⁴ But it nevertheless sustained weighted voting

⁶²5 Cal. 3d at 677.

⁶³1 Cal. App. 3d 831, 82 Cal. Rptr. 61 (1969).

⁶⁴"As we interpret *Kramer*, *supra*, the guidelines laid down in it must be followed in testing the constitutionality of a statutory distribution of voting rights in elections pertaining to the affairs of a governmental unit or public corporation whether it be a school district or some other limited special purpose unit. * * * We perceive no logical basis for holding that the same constitutional standards of fairness governing distribution of the election franchise for school district elections should not be applicable to elections pertaining to special entities exercising other limited governmental functions. * * * Schools as well as water service may be private or public. But when the state engages in those activities through a governmental agency and provides for citizen participation through the election process, the distribution of voting rights must meet the equal protection standards prescribed in *Kramer* and *Cipriano*." 1 Cal. App. 3d at 837.

according to the assessed value of landownership.⁸⁸ It is not likely that *Schindler* would have been sustained on appeal. No hearing was sought in the California Supreme Court; that Court in the course of the opinion in *Burrey* spoke of *Schindler* with some asperity.⁸⁹

The intriguing thing is that the Court below has unanimously found Tulare Lake Basin Water Storage District to be a governmental unit to which the standards of the voting rights cases apply. This is implicit in the Court's order that the district be reapportioned, so that each of its eleven divisions shall reflect approximately the same number of dollars. The paradox of the decision is that the notion of equality receives the Court's support in requiring such reapportionment, while the majority suffers weighted voting to continue unabated. The majority adverts to the fact that the total assessed valuation of the land represented by plaintiff Fred Salyer in Division 4 is nearly three times greater than the total assessed valuation of the land represented by Boswell vice-president A. L. Vander-

⁸⁸"... [T]he grant of franchise in proportion to the assessed value of landownership fairly distributes voting influence among those primarily and directly interested in direct proportion to the stake each has in the District." 1 Cal. App. 3d at 839.

⁸⁹"This decision may be difficult to reconcile with the Supreme Court cases on this subject, particularly *Kolodziejski* which was decided after *Schindler*. (See *Girth v. Thompson* (1970) 11 Cal. App. 3d 325, 330, 89 Cal. Rptr. 823.) However, since irrigation districts are substantially different from the EMID—their powers are fewer and more limited to the particular purpose for which the districts were created—we do not reach that question here." *Burrey v. Embarcadero Municipal Improvement District*, 5 Cal. 3d 671, 682 (1971). The *Girth* case, cited with approval by the court in *Burrey*, held that the voting rights cases applied to an irrigation district and disapproved of an earlier contrary holding in *Thompson v. Board of Directors*, 247 Cal. App. 2d 587 (1967).

griff in Division 10. The majority will have none of such inequality:

"Such malapportionment presents a classic violation of equal protection and therefore defendant is ordered to submit a plan to correct this malapportionment within six months of the date this decision becomes final."

But the majority, straining at a gnat and swallowing a camel, at the same time permits a system to continue to exist which will allow the J. G. Boswell Company to vote 37,825 times.

Conclusion.

There is no reason why the residents of Tulare Lake Basin Water Storage District should not be allowed to vote. But even if the franchise be denied them, there is no way that the fair name of equal protection can be stretched to cover §41001 of the California Water Code and its provision that "Each voter may . . . cast one vote for each one hundred dollars (\$100), or fraction thereof, worth of land. . . ." Plato defined oligarchy as "government resting on a valuation of property".⁶⁷ While Article IV, Section 4 of the Constitution, guaranteeing to "every state in this Union a Republican Form of Government" has been held not to be for judicial enforcement,⁶⁸ the clause at least shows us what the Framers had in mind. Is Tulare Lake Basin Water Storage District a Republican Form of Government? Mr. Madison would doubtless be surprised to be told that it is. One suspects that he would be equally surprised that such a system should ever have been conceived in an American state, much less tolerated fifty years.

⁶⁷The Republic (Bakewell Ed., page 323).

⁶⁸Baker v. Carr, 369 U.S. 186 (1962).

It is respectfully submitted that the questions presented by this appeal are substantial and that they are of public importance.

Dated this 5th day of May, 1972. •

C. RAY ROBINSON,
Merced, California,

THOMAS KEISTER GREER,
Rocky Mount, Virginia,
Counsel for Appellants.

APPENDIX A.

Memorandum and Order.

Original Filed: Nov. 13, 1970.

In the United States District Court, Eastern District of California.

Salyer Land Company, a California corporation, C. Everette Salyer; Fred Salyer; Lawrence Ellison; and Harold Shawl, Plaintiffs, vs. Tulare Lake Basin Water Storage District, a public district, Defendant. Civil No. F-414.

Defendant's motion to dismiss was submitted on briefs without argument; C. Ray Robinson and Thomas Keister Greer, appearing for plaintiffs; and Ernest M. Clark and Robert M. Newell, appearing for defendant.

Plaintiffs' action is authorized by Section 1983 of Title 42 of U. S. Code, and alleges that plaintiffs are being denied constitutional rights under color of State law, particularly sections 41000 and 41001 of the Water Code of California which permits only landowners to vote, and gives them one vote for each \$100 worth of land.

Plaintiffs complaint presents a substantial constitutional question as to whether the sections of the California Water Code are in conflict with the United States Constitution.

Therefore, defendant's motion to dismiss is denied and a three-judge court is ordered convened pursuant to 28 U.S.C. § 2284.

DATED: November 13, 1970.

M. D. CROCKER
United States District Judge

Memorandum and Order.

Original Filed: February 17, 1972.

In the United States District Court, Eastern District of California.

Salyer Land Company, a California corporation, C. Everette Salyer, Fred Salyer, Lawrence Ellison, and Harold Shawl, Plaintiffs, vs. Tulare Lake Basin Water Storage District, a public district, Defendant. No. F-414 Civ.

This court has jurisdiction under section 1343 of Title 28 and section 1983 of Title 42 of the United States Code, and a three-judge court has been convened pursuant to section 2284 of Title 28 of the United States Code.

The case was submitted on factual statements of the parties and briefs, without testimony or oral argument. Plaintiffs were represented by C. Ray Robinson, Esq., and Thomas Keister Greer, Esq.; defendant was represented by Robert M. Newell, Esq., and Ernest M. Clark, Jr., Esq.

Plaintiffs are landowners or resident registered voters within the area covered by defendant, Tulare Lake Basin Water Storage District, which was organized pursuant to California law.

In this action, plaintiffs contend that California Water Code §§ 41000 and 41001¹ are unconstitutional

¹ § 41000. *Qualification.* Only the holders of title to land are entitled to vote at a general election.

§ 41001. *Vote in precinct; number of votes.* Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each one hundred dollars (\$100), or fraction thereof, worth of his land, exclusive of improvements, minerals, and mineral rights therein, in the precinct.

in that they deny plaintiffs the equal protection of the law guaranteed by the fourteenth amendment of the Constitution of the United States in that they permit only landowners to vote and give them one vote for each \$100 of assessed valuation. Thus non-landowners cannot vote, and the small landowners get fewer votes than the large landowners.

Plaintiffs seek an order of this court enjoining defendant from giving effect to these sections and requiring defendant to submit a plan whereby all residents be permitted only one vote regardless of land-ownership.

At the outset, defendant asks this court to abstain from rendering a decision, but abstention is not proper in this case as the California Supreme Court has already upheld the constitutionality of these two sections.

Defendant is a water storage district organized in 1926 under California law which limits its activities to the development and improvement of the water supply within the district, thus benefiting the land which alone bears the cost.

It performs no governmental functions of general concern to the populace and provides no service to the general public such as found by the court in *Burrey v. Embarcadero Municipal Improvement District* recently decided by the Supreme Court of California.

The State of California has a compelling interest in the development of its water resources, and limiting the vote to landowners is necessary to further this state interest because it is doubtful if the District would have been formed unless the persons paying the expenses could control them.

While it is true that the activities of the District affect the economy of the area which is of interest to

residents that are not landowners, this is an indirect interest and not a direct, primary and substantial interest that would entitle them to vote. Thus limiting the vote to landowners in this particular water district does not violate plaintiffs' constitutional rights, and the "one man, one vote" cases cited by plaintiffs are not controlling in this special purpose district.

Section 41001 providing one vote for each \$100 of assessed valuation is not unconstitutional as the benefits and burdens to each landowner in the District are in proportion to the assessed value of the land, so permitting voting in the same proportion fairly distributes the voting influence.

The remaining issue in this case is the malapportionment of the divisions that is alleged in paragraph XII of the complaint. Plaintiffs pray that the District be required to submit a plan for holding all elections at large.

Defendant argues that sections 43730 and 41550 of the California Water Code provide adequate State remedies, that the remedy is not within the Civil Rights Act, and that if it is, this court should abstain due to the adequate State remedies.

California Water Code §§ 43730 and 41550 do not provide an adequate State remedy for malapportionment. Section 43730 pertains to improper board action and 41550 provides a means of forcing the board to hold an election. Section 41152 provided the redivisioning remedy which plaintiffs seek, but was repealed in September 1969. From that date to the present, there has been no adequate State remedy.

Section 39777 will not grant relief as it merely requires initial segregation in divisions "possessing the

same general character of water rights or interests in the water of a common source." Nor does section 41153 help, as it merely contemplates that the board may make a redivision order; however, there is no mandatory requirement present.

Where there is no State remedy and a Civil Rights violation occurs, 42 U.S.C. 1983 has been interpreted "to provide a remedy. . . ." [*McNeese v. Board of Education*, 373 U.S. 668, 672 (1963)].

Here we have divisions created by a state engineer (approved) acting under state law, and these divisions have been maintained by the Board of Directors also purporting to act under state law. This action is within 42 U.S.C. 1983. [See, *Monroe v. Pape*, 365 U.S. 167 (1961)].

The present divisions have not been redivided for 40 years. Total assessed valuation of the land in Division 4 is nearly three times greater than the total assessed valuation of Division 10 (Division 4—\$1,954,547; Division 10—\$688,425). The result is that \$100 of assessed valuation in Division 10 has almost three times the voting power of \$100 of assessed valuation in Division 4. In addition, Division 4 has 110 separate landowners, whereas Division 10 has only 4. Each Division is entitled to one director on the District's Board of Directors. Consequently, the 110 landowners in Division 4 have only one-third the representation on the Board when compared to Division 10.

Such malapportionment presents a classic violation of equal protection and therefore defendant is ordered to submit a plan to correct this malapportionment within six months of the date this decision becomes final.

If defendant is unable to redivision the district into divisions which are reasonably equal in assessed valuation and also possess the same general character of water rights or interest in the water of a common source as required by section 39777 of the California Water Code, the plan may provide for elections at large.

Dated: February 17, 1972.

/s/ M. D. Crocker
United States District Judge
Robert H. Schnacke
United States District Judge

Salyer Land Company v. Tulare Lake Basin Water Storage District No. F-414 Civil.

Original filed Feb. 17, 1972.

BROWNING, Circuit Judge, concurring in part, dissenting in part:

Defendant asks this court to abstain from rendering a decision with respect to California Water Code §§ 41000¹ and 41001.² "But the abstention rule only applies where 'the issue of state law is uncertain'" *Wisconsin v. Constantineau*, 400 U.S. 433, 438 (1971), and here the meaning of the challenged state statutes is clear.

Turning to the merits, it is clear at the outset that the Equal Protection Clause applies not only to the challenged statutes but also to their implementation by the defendant district. "The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State." *Avery v. Midland County*, 390 U.S. 474, 479 (1968). Defendant and similar entities "are but the agents or representatives of the state in the particular locality in which they exist. They are organized for the purpose of carrying out the purposes of the legislature in its desire to provide for the general welfare of the state." *In re Madera Irrigation District*, 92 Cal. 296, 317, 28 Pac. 272, 276 (1891). See *Girth v. Thompson*, 11 Cal.App.2d 325, 328 (1970).³

¹See majority opinion at note 1.

²See majority opinion at note 1.

³California Water Code § 39059 declares that the powers conferred upon the board of directors of a water storage district "are police and regulatory powers and are necessary to the accomplishment of a purpose that is indispensable to the public interest." Section 39061 declares that use of water in a water stor-

(This footnote is continued on next page)

To evaluate the constitutionality of the challenged voting rules, the purpose and effect of the rules must be examined in the context of the district's activity. "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interests of those who are disadvantaged by the classifications." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) quoted in *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969).

I.

Exclusion of persons from the vote must be "carefully scrutinized," and can be sustained only if "necessary to promote a compelling state interest." *Kramer v.*

age district, and of facilities and property to carry out the district's functions under the statute, "is a public use."

Water storage districts are governed by California Water Code §§ 39000-48401. The Board of each district has "all power and authority necessary to enable it to fully perform the duties imposed upon it. . . ." § 43150, *see generally* §§ 4300-44000. This includes the power to employ and discharge persons on a regular staff and to contract for the construction of district projects. § 43152.

The district can initiate projects and supervise their completion. §§ 42200-42750. It can condemn private property for use in such projects. §§ 43530-43533. It may cooperate with and contract with other agencies, state and federal. § 43151.

The district can authorize general obligations bonds and interest-bearing warrants. *See* §§ 44900-45900. It can also impose tolls or other charges on the use of its water, irrigation mechanisms, and other services and facilities. It can levy "assessments" up to \$2.50 per acre for organizational expenses and costs incurred in undertaking specific projects; for all other purposes, assessments are prorated to the extent of benefit conferred by the district project. *See* §§ 46000-47900.

Union Free School District, supra, 395 U.S. at 627.⁴ It cannot be sustained unless "those excluded are in fact substantially less interested or affected than those the statute includes." *Id.* at 632.⁵ Thus the interest of the state in confining the franchise to owners of land in the district must be weighed against the interest of those said to be disadvantaged by this classification, namely, lessees of such property and non-landowning district residents.

After review, it appears that there is compelling reason for disenfranchisement of non-owner, non-lessee residents of the district, but not, contrary to the majority's holding, for the exclusion of lessees of district land.

The relevant facts may be briefly summarized.

Much of California's agricultural land suffers from too little water or, intermittently, from too much. Conservation, distribution, and control of the water supply are major state concerns.⁶ The California Legislature has authorized a wide variety of special instrumentalities, including water storage districts, to provide a flexible response to water problems on a local basis. These special purpose agencies are credited with "vast-

⁴See also *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969).

⁵See also *Cipriano v. City of Houma, supra*, 395 U.S. at 704. *Phoenix v. Kolodziejki*, 399 U.S. 204, 207, 212-213 (1970).

⁶See, e.g., California State Constitution, Article XIV, § 3; California Water Code §§ 100, 104, 105. See note 2.

ly expanding water distribution facilities" in the state. Rogers & Nichols, *Water for California*, Vol. 2, § 448, at 35.

The defendant water storage district consists of 193,000 acres of intensively cultivated, highly fertile farm land. The district is sparsely populated—only 78 persons, including 18 children, live within its boundaries. This is said to be typical of such districts because the lands are agricultural, and because they are commonly arid, subject to flooding,⁷ or both. Nearly 85 per cent of the land in the district is farmed by four corporations. The residents of the district are all employees, or members of employees' families, of one or another of the four farming corporations. Only two residents are landowners; not directly, but through ownership of a corporation that farms about 16 per cent of the district's land.

Landowners have a direct and substantial interest in the efficient and effective management of the district. In keeping with the purpose of water storage districts, defendant district is authorized to plan and execute projects "for the acquisition, appropriation, diversion, storage, conservation, and distribution of water." Calif. Water Code § 42200.⁸ Defendant district has adopted and executed three such projects since its formation in 1924. These projects involved the purchase and stor-

⁷Nearly half of the land in the defendant district was flooded in 1969. One third of the district still remains under water.

⁸The plans may also include "any drainage or reclamation works connected therewith, and the generation of hydroelectric energy incident thereto, and to sale and distribution thereof. . . ." By the express terms of the statute, however, these additional powers may be used only in connection with and incidental to a plan to acquire, divert, store, conserve, and distribute water in the district. There is no evidence that the defendant district engaged in the generation, sale, or distribution of electric power.

age of water for irrigation of lands within the district and the construction of a water delivery system. Each project required a multi-million dollar expenditure. In accordance with the statute (Calif. Water Code § 46176), the costs were assessed upon the lands of the district in proportion to benefits received by each tract.

The economic burden from district projects *cannot* fall on non-owner, non-lessee residents. There are no forms of non-property oriented taxes, assessments, or other means through which district costs could be spread to others. *Cf. Cipriano v. City of Houma*, 395 U.S. 701, 705 (1969); *Phoenix v. Kolodziejski*, 399 U.S. 204, 209-10 (1970).

The district performs no governmental function and provides no service of direct concern to residents of the district. *Cf. Phoenix v. Kolodziejski*, 399 U.S. at 206, 209. Its activities relate solely to the storage and distribution of water for use in farming the land.⁹ These functions and services would not differ at all if no one lived in the district. The district has nothing to do with furnishing police and fire protection, schools, roads, and other governmental services and facilities usually provided to residents of an area. For that reason, people who happen to reside within the physical boundaries of the district are not constituents of the officers or board of directors of the district in any real sense.

⁹Plaintiffs argue that defendant district has the power to, and does, engage in flood control activities, and that these are obviously of interest to residents of the district. The power of the district in this respect is disputed, but any such power the district might possess would be limited to flood control connected with and incident to the exercise of the district's primary functions of water storage and distribution.

As employees of the farming corporations, residents of the district have an interest in the success of the farm operation and, hence, in the activities of the district that contribute to the success of those operations. But this interest is no different in kind or degree from the interest of other employees of the farming corporations who do not reside in the district, and is little different from the interest of non-resident suppliers and others whose economic well-being may be linked to the success of the district's farming operations. If residents are constitutionally entitled to vote in district elections because of their interest as employees, so too are non-resident employees and, perhaps, all other economically affected non-residents.

Against this factual background, it is possible to evaluate the state's interest in limiting the franchise and the impact of the limitation upon disenfranchised lessees and residents.

The state's interest in the management of its water resources, and, therefore, in the creation and effective operation of water storage districts and similar agencies, is obviously a vital one. Limitation of the franchise to those who own or lease district land is necessary to further this compelling state interest for two reasons.

First, the limitation is necessary to induce landowners to join in the creation of such districts. It is inconceivable that the non-resident owners, controlling 85 per cent of the land in the defendant district, would have agreed to formation of the district or its continued existence had they been denied control over the selection and implementation of the multi-million dollar district projects designed solely to benefit the lands of the district and to be paid for entirely by assessment

upon those lands. See *Schindler v. Palo Verde Irrigation District*, 1 Cal.App.3d 831, 839, 82 Cal. Rptr. 61 (1969).¹⁰ It is also unlikely that non-resident landowners would have participated had landowner control been subject to unpredictable dilution or deliberate manipulation¹¹ by the votes of residents having only a remote interest in the district's operations.

In the second place, in view of the nature of the issues to be voted upon, the exclusion of non-owner, non-lessee residents from the franchise in a water storage district is dictated by the state's interest in obtaining intelligent and responsible decisions as to the most effective water development program for the lands of the respective districts.¹²

Turning to those who are assertedly disadvantaged, it is evident from the foregoing discussion that the interest of residents who neither own nor lease property within the district is substantially less significant than that of the owners, and is both remote and indirect. Their exclusion from district elections can have only a

¹⁰There are, in fact, "unique problems that make it necessary to limit the vote. . . ." *Phoenix v. Kolodziejki*, 399 U.S. 204, 213 (1970). We are told that some California water storage districts have no residents, or only a nominal number. Unless ownership of an interest in the district's land were a permissible basis for the franchise, such districts could not function at all.

A similar problem faces reclamation districts organized under Division 15 of the California Water Code. Voting in these districts is also limited to property owners. See § 50704. There are no residents on seven such reclamation districts totaling 88,654 acres that are located within the boundaries of defendant water district.

¹¹Sixty-six of the 78 persons now reported to reside in the district are employees of the corporate farms living on the corporation's land.

¹²*Oregon v. Mitchell*, 400 U.S. 112, 242 (1971) (opinion of Brennan, White, and Marshall, JJ); *Lassiter v. Northampton Elections Bd.*, 360 U.S. 45, 51 (1959).

minimal impact upon them, and is amply justified by the compelling state interest.

Contrary to the majority's view, however, this is not true of the exclusion of those who lease lands in the district for farming. This group's interest in the district's projects to increase the water available for farming and to improve its distribution is indistinguishable from the interest of the owners. They are also equally interested in the cost of the district's projects, for this expense will be passed on to them by express agreement or in the form of increased rentals. See, e.g., *Phoenix v. Kolodziejski*, *supra*, 399 U.S. 204, 210-11.¹⁸ And obviously the state's interest in intelligent and responsible decisions regarding the district's water management program is not advanced by excluding those who actually farm the land.

The only substantial question is whether lessees must be excluded to induce landowner participation. Nothing in the record supports an affirmative answer; and the contrary is strongly suggested by the fact that the four corporations that farm 85 per cent of the district's land are major lessees of land as well as the largest landowners.

Thus, excluding non-owner, non-lessee residents advances the state's overall interest in intelligent and effective water resources development by encouraging the formation of water storage districts and by helping assure informed and interested voters in district elections.

¹⁸Defendant suggests that the lessees might obtain a provision in the lease for a proxy from the lessor as allowed by § 41002. If a statute otherwise infringes upon the Equal Protection Clause, the infringement of constitutional rights is not ameliorated by a possibility that relief might be obtained through private contracts.

II

Since ownership of a property interest in district land may be required as a qualification for voting in water storage district elections, it might seem to follow that it would also be permissible to weight the votes in proportion to the value of the voter's land, as the majority holds. *See Schindler v. Palo Verde Irrigation District, supra*, 1 Cal.App.3d at 839. Brief consideration demonstrates, however, that this is not so.

In a wide variety of contexts the Supreme Court has emphasized that where an election concerns the exercise of important governmental powers having a substantial impact upon all members of the particular electorate, as here, the state is required to insure that the vote of every member of the electorate counts the same, so far as practicable, as that of every other member of the electorate.¹⁴ In *Hadley v. Junior College District*, 397 U.S. 50, 58-59 (1970), Mr. Justice Black summarized the Supreme Court's position in language applicable to this case:

"[A] State may, in certain cases, limit the right to vote to a particular group or class of people. As we said before, '[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent ex-

¹⁴*Avery v. Midland County*, 390 U.S. 474, 485 (1968); *Swann v. Adams*, 385 U.S. 440 (1967); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964); *Burns v. Richardson*, 384 U.S. 73 (1966); *Roman v. Sincok*, 377 U.S. 695 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Maryland Committee v. Tawes*, 377 U.S. 656 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Wesbury v. Sanders*, 376 U.S. 1, 7-8 (1964); *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

perimentation.' [Sailors v. Board of Education, v. Board of Education, 387 U.S. 105, 110-11 (1967)] *But once a State has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.'* Gray v. Sanders, 372 U.S. 368, 381 (1963)" (emphasis added).

Cf. *id.* at 56. As Justice White said in *Phoenix v. Kolodziejski*, *supra*, 399 U.S. at 209, "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, *the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. . . . Placing such power in property owners alone can be justified only by some overriding interest of the owners that the State is entitled to recognize*" (emphasis added).

Defendant has identified no compelling state interest in weighted voting in water storage district elections.

The statute itself weakens the contention that landowners would decline to participate in the formation of a water storage district if each vote weighed equally. A majority of the *number* of landowners is normally required to form such a district (Calif. Water Code § 39400),¹⁵ and a majority of the *number* of landowners voting is required to approve a district project. Calif. Water Code § 42550.

¹⁵The alternative is "not less than 500 petitioners, each of whom is the holder of title to land therein and which petitioners include the holders of title to not less than 10 percent in value of the land included within the proposed district." § 39400.

Neither can it be said that the state's interest in intelligent and responsible elections is served by weighted voting. There is nothing in the record to support the assumption that a small landowner is less likely than a large one to possess the information and understanding of water development problems that is requisite to intelligent and responsible voting on the affairs of a water storage district. Cf. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). And the landowner's interest in finding and implementing solutions to those problems is no less acute because his operation is small. Efficient production from his smaller acreage may be of greater economic consequence to him; and the lesser absolute share of the cost of district projects he may¹⁶ be required to bear may impose a greater burden. As Judge Wisdom said in a related context, "In terms of voting responsibility, there is no necessary correlation between the amount of any assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more to that person than a hundred thousand dollar house to another." *Stewart v. Parish School Board of Parish of St. Charles*, 310 F. Supp. 1172, 1179 (E.D. La. 1970), *aff'd* 400 U.S. 884 (1970). See also *Burry v. Embarcadero Municipal Improvement District*, 5 Cal.3d 671 (1971).

¹⁶Project costs are distributed in proportion to the benefit conferred upon the particular tract rather than in proportion to the tract's value or size. California Water Code § 46176.

III

The order of the California Department of Water Resources approving the formation of the defendant district divided the district into eleven divisions for election of directors to the district's board.¹⁷

Each division elects one director, but the number of landowners in the divisions varies from 110 in division four to four in division ten.¹⁸ While the record does not show the number of lessees in each division, there is no reason to believe that the gross malapportionment among the divisions will be corrected merely by including lessees among those qualified to vote.

Such malapportionment does indeed present a classic violation of equal protection. See *Reynolds v. Sims*, 377 U.S. 533, 562-63 & n.40 (1964). As Mr. Justice Black said in *Hadley, supra*, after finding that important governmental functions were involved having sufficient impact throughout the constituency, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal number of voters can vote for proportionally equal numbers of officials." 397 U.S. at 56.

¹⁷California Water Code § 39777 reads:

"*Division of district.* The order on final hearing shall also divide the proposed district into five, seven, nine, or eleven divisions so as to segregate into separate divisions lands possessing the same general character of water rights or interests in the water of a common source. The divisions shall be numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, or eleventh, according to the number of the division."

¹⁸Even were the weighted voting practices of the district valid, the malapportionment would be substantial. The assessed value of the land in division four is \$1,954,547, while that of division ten is \$688,425.

It is suggested that the apportionment reflects compliance with the statutory directive that division lines be drawn "so as to segregate into separate divisions lands possessing the same general character of water rights." See note 17. It is unnecessary to consider whether this would justify the result, if true. The record is clear that the divisional lines were not drawn on this basis.¹⁹ The record also demonstrates that the statutory directive is irrelevant to the drawing of division lines in the defendant district for all water rights in the district are of the same character.²⁰

Finally, defendant seems to imply that the malapportionment of divisions does not involve state action subject to the Equal Protection Clause. But as noted earlier, the present divisions were approved by the California Department of Water Resources as required by the

¹⁹A "Report on Feasibility of Proposed Tulare Lake Basin Water Storage District," submitted to the California District Securities Commission as an exhibit to defendant district's Amended Report and Estimate of Cost for Project 1, states at pages 73-74:

"The proposed divisions follow generally the lines of existing reclamation districts. It is also understood that they are adjusted to give the balance of representation desired by the parties to the agreement. . . ."

²⁰Plaintiffs' factual statement, which defendant accepted without response, states:

"The water rights of Tulare Lake Basin Water Storage District, for example, its water right in the Kings River as stated in the Kings River Schedule, and its water right derived from its contract with the state of California, are for the equal benefit of the lands in the District. That is to say, there are no gradations or priorities within the District as to District water."

The following appears in defendant's Amended Report and Estimate of Cost for Project 1 (see note 19):

"That is to say, all waters—whatever that quantity may be—acquired by or under control of the District, are to be *prorated equally over the acreage* in that District. Or, in other words, all things being equal, every acre of land within the boundaries of your District will be equally benefited by your project." (Emphasis in original.)

statute (see note 17), and "the prohibitions of the Fourteenth Amendment extend to 'all actions of the State denying equal protection of the laws' whatever the agency of the State taking the action. . . ."

Cooper v. Aaron, 358 U.S. 1, 17 (1958). See also *Avery v. Midland County*, *supra*, 390 U.S. 474, 479-80.

/s/ James R. Browning
Circuit Judge

APPENDIX B.

**Notice of Appeal to the Supreme Court of the
United States.**

Original Filed: March 14, 1972.

C. RAY ROBINSON

650 West 19th Street

Merced, California 95340

Telephone: 209-722-6244

THOMAS KEISTER GREER

110 Maple Avenue

Rocky Mount, Virginia 24151

Telephone: 703-483-5178

Attorneys for Plaintiffs

United States District Court, Eastern District of California, Southern Division.

Salyer Land Company, a California corporation, C. Everette Salyer; Fred Salyer; Lawrence Ellison; and Harold Shawl, Plaintiffs, vs. Tulare Lake Basin Water Storage District, a public district, Defendant. Civil No. F-414.

NOTICE IS HEREBY GIVEN that Salyer Land Company, C. Everette Salyer, Fred Salyer, Lawrence Ellison and Harold Shawl, plaintiffs above-named, hereby appeal to the Supreme Court of the United States from that part of the judgment entered March 10, 1972 which denies an injunction restraining the enforcement, operation and execution of Sections 41000 and 41001 of the California Water Storage District Law.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated this 14th day of March, 1972.

C. RAY ROBINSON

THOMAS KEISTER GREER

By /s/ T. Keister Greer

Counsel for Plaintiffs

Certificate of Service

I hereby certify, pursuant to Rule 33 of the Rules of the Supreme Court of the United States, as amended, that I am a member of the Bar of the Supreme Court of the United States, and that on this 14th day of March, 1972, copies of the foregoing notice of appeal were deposited in a United States post office, with first class postage prepaid, addressed to counsel of record for the defendant and the amici curiae at their post office addresses, that is to say, to Ernest M. Clark, Esq., Donnelly, Clark, Chase & Haakh, 600 South Spring Street, Los Angeles, California, to Robert M. Newell, Esq., Newell and Chester, 650 South Grand Avenue, Suite 500, Los Angeles, California, to Denslow Green, Esq., 219 South D Street, Madera, California, and to George Bayse, Esq., 1007-7th Street, Suite 500, Sacramento, California. I further certify that all parties required to be served have been served.

/s/ T. Keister Greer

Thomas Keister Greer

APPENDIX C.

Bulletin No. 155, Department of Water Resources, State of California, "General Comparison of California Water District Acts" pp. 103-105 (1965):

"WATER STORAGE DISTRICTS

- 1 Citation Water Code, Div. 14 comprising Secs. 39000-48401 (derived from 1921:914:1727, D. A. 9126). "California Water Storage District Law".
- 2 Purposes Storage and distribution of water; drainage and reclamation in connection therewith; generation and distribution of power incidental thereto (Secs. 42200, 43000, 43025); such uses are a public use (Sec. 39061).
- 3 Territory Lands already irrigated or susceptible of irrigation from a common source and by same system; need not be contiguous (Secs. 39400-39402).
- 4 Overlap May include land in other agencies including other water storage districts having different plans, purposes, and objects (Sec. 39401).
- 5 Pet'rs. Majority of holders of title or evidence of title representing majority in value of lands, or 500 holders of 10% in value (Sec. 39400); cost bond required (Sec. 39428).
- 6 Pet. to Department of Water Resources (Sec. 39430).
- 7 Procedure Petition to, and investigation, hearing and order by Dept. of Water Resources, election (majority vote) (Secs. 39400-40103).

- 8 Voting** 1 vote for each \$100, or fraction, assessed value of land exclusive of improvements, minerals, and mineral rights; proxy vote allowed (Secs. 41000-41002).
- 9 Records** Order following hearing on petition and formation, project abandonment, exclusion, and inclusion orders: County Recorder of each county where lands located (Secs. 39779, 40101, 42359, 48081, 48229, 48258); formation, inclusion, and exclusion records: Secretary of State (Secs. 40104, 40659, 48300).
- 10 Gov. Code
Sec. 54900** Not applicable—assessments not on ad valorem basis.
- 11 Gov. Bd.** 5, 7, 9, or 11 Directors, depending on number of divisions (Secs. 39777, 39928).
- 12 Eminent
Domain** All property necessary for projects of district; private property devoted to use of other districts, cities, or counties may not be taken (Sec. 43530); may not condemn in another county without approval of board of supervisors of affected county (Sec. 43532.5).
- 13 State and
Fed. Coop.** May cooperate and contract with the State and the U.S. under any laws of the State or the Fed. reclamation laws (Secs. 44000-44105); may enter into any agreement appertaining to or beneficial to dist. project (Sec. 43151).
- 14 Debt Seg.** See "Assessments".

15 Bonds

General obligation, by majority of votes cast by assessed voters (Secs. 45100, 45270, 45400); but see Secs. 42330, 41000 re vote required on adoption of projects and at general elections. General obligation bonds without election upon $\frac{3}{4}$ vote of district board and approved by the department or (after July 1, 1965) the Calif. Dists. Sec. Com., if project or contract approved at election and assessments outstanding (Sec. 45102). Unpaid warrants draw interest (Sec. 44626). May issue interest-bearing warrants payable at a future time, the total amount payable in any year not to exceed $\frac{1}{4}$ of 1% of assessed valuation of land unless approved by the department or (after July 1, 1965) the Calif. Dists. Sec. Commission, and may not extend over 5 years unless approved by majority vote at an election (Secs. 44900-44911); may issue direct assessment warrants by $\frac{3}{4}$ vote of board and approval of the department or (after July 1, 1965) the Calif. Dists. Sec. Com. to finance project or contract approved at an election (Secs. 45900, 46381).

16 Revenues

Tolls and charges for use of water, irrigation, and other services (Secs. 43006, 43007, 47180); power revenues (Secs. 43025, 43026, 47700, 47701); sales of surplus property, water and power (Secs. 43507, 43533, 43555, 43001, 43026); leases (Sec. 43506).

**17 Assess-
ments**

Assessments for organization and other preliminary expenses equally upon each acre up to \$2; additional preliminary assessments up to \$2.50 for new projects (Secs. 46000-46009); for all other purposes, assessments of lands according to benefits; may be payable in installments (Secs. 46150-47701, 44030-44032); interim project assessments on each acre, up to \$2 per acre (Secs. 46375-46381).

**18 Tax. of
Dist. Prop.**

Dist. works, including reservoirs, dams, rights of way, canals, power plants, transmission lines, etc., not taxable for state, county or city purposes (Sec. 43508).

**19 Districts
Sec. Com.**

Financial supervision and bond certification approval under Dists. Sec. Com. Law if requested (Secs. 44911, 45100, 45101 (operative until July 1, 1965), 45701; Water Code, Sec. 20003); after July 1, 1965, bonds may be issued unless certified (Sec. 45100); keep records (Sec. 43159). After July 1, 1965, perform following duties now exercised by the Dept. of Water Resources: Supervise levy of assessments (Secs. 46000-46381), see that assessments are levied (Sec. 40382), appoint assessment commissioners (Secs. 42355, 46150, 46355, 47551) and issue warrants for their compensation (Secs. 44600, 46154), appoint tax adjustment board (Sec. 46225), supervise au-

thorization and construction of works (Secs. 42200-42752, 44005, 46150), approve purchases in excess of \$500,000 (Sec. 43503), examine progress reports and financial statements and make recommendations thereon (Sec. 44430), examine district affairs and make reports (Sec. 44431), prescribe form of district reports and accounts (Sec. 44432), approve issuance of district warrants payable at future times (Sec. 44904), approve issuance of bonds without an election (Sec. 45102), approve direct assessment warrants (Sec. 45900), approve preliminary assessments in excess of 50¢ (Sec. 46008), approve interim project assessments (Sec. 46377).

20 Dept. of
Wat. Res.

Receive petitions for formation, investigate, hold elections and supervise organization of new districts (Secs. 39400-40103); give information and make preliminary investigations (Secs. 39081-39082); keep records (Sec. 43159); execute warrants (Secs. 39603, 44600); investigate under Dists. Sec. Com. Law (see "Districts Sec. Com."); fill board vacancies (Sec. 40500); appoint directors where election not required (Sec. 41307). Until July 1, 1965, redivide districts (Sec. 41152); supervise exclusions (Secs. 48000-48087) and inclusions (Secs. 48200-48260); see also "Districts Sec. Com." After July 1, 1965, upon re-

quest of Calif. Dists. Sec. Com., investigate and report on feasibility of district projects or their abandonment (Secs. 42300, 42500).

**21 Inclusion
Exclusion**

Inclusion (adjacent lands, irrigable from dist. works, if for best interest or district): by petition, hearing, order of the board, and election if sufficient protests made (Secs. 48200-48260); land may be subject to prior capital assessments (Sec. 47550). Exclusion (lands not benefited or if for best interests of district): by petition, hearing, and order of the board (Secs. 48000-48087). Consolidation provided (Sec. 48350).

**22 Disso-
lution**

Same as for irrigation districts (Sec. 48400); also dissolved by failure to file report on plans within 10 years (Dept. of Water Resources or, after July 1, 1965, the Calif. Dists. Sec. Com. may extend time 15 years) or by abandonment of plans or failure of voters to approve plans (Secs. 42280, 42360, 42552).

23 No.

9."

